Tax Ordinance, 1947. The tests which must be applied in ascertaining whether or not a particular transaction constitutes "adventure or concern in the nature of trade" have been approved in *Leeming* v. *Jones*.[13] The four tests have been set out by Gill F.J. (as he then was) in the case of *E.* v. *Comptroller-General of Inland Revenue*[14] as follows: —

(i) the existence of an organisation;

(ii) activities which lead to the maturing of the asset to be sold;

(iii) the existence of special skill, opportunities in connection with the article dealt with;

(iv) the fact that the nature of the asset itself should lend itself to commercial transactions.

The existence of any one of the above is sufficient to establish the existence of an adventure in the nature of trade. In the present case, there is ample evidence that there was in existence an housing estate organisation in the form of a limited company. There is also evidence to show that the appellant company had special skill and opportunities in connection with the said property in the sense that the land in question was ideal for housing development and formed a natural extension to an existing housing estate known as University Gardens. I would, therefore, agree with the submission of learned counsel for the respondent that the fact that the compulsory purchase is an isolated transaction does not really matter since there is sufficient evidence that the transaction is a trading transaction or best indicia of trade. As stated earlier on, the appellant company knew fully well that the land in question was to be acquired by the Government even before they bought it. The five vendors, who ultimately became the first directors of the appellant company, must have known that, if they did not sell the land to the company, their individual task of convincing the collector that the rubber land was ripe for immediate development and therefore should attract much higher market value than the purchase price would be more difficult. On the facts of the present case, I am therefore of the view that this isolated transaction, although it concerns compulsory acquisition, should lawfully be regarded as a trading transaction; and, as such, I hold that the difference between the acquisition award and the purchase price and cost of the land is income in respect of gains or profits from a business within the meaning of section 4(a) of the Income Tax Act, 1967.

I do not think it is necessary for me to deal at length with the fourth ground of appeal. There is no merit in the submission that the receipt obtained by the appellant company is not specifically charged to tax under the income tax legislation. It seems to me abundantly clear from the facts of the present case that the receipt obtained by the appellant falls squarely within the ambit of section 4(a) of the Income Tax Act, 1967.

In the event, I dismiss this appeal with costs.

*Appeal dismissed.*

Solicitors: *Shearn Delamore & Co.*

## PUBLIC PROSECUTOR v. TEH AH CHENG

**[A.Cr.J. (Abdoolcader J.) February 25, 1976]**
**[Ipoh — Criminal Appeal No. 91 of 1975]**

*Criminal Law and Procedure — Sentence — Appeal against — Age of accused — Firearms cases — Principles of sentencing with regard to Firearms cases — Criminal Procedure Code (F.M.S. Cap. 6), s. 294 — Arms Act, 1960, s. 9(a).*

*Firearms — Possession — Principles of sentencing — Age — Arms Act, 1960, s. 9(a).*

This was an appeal against the order made in the Special Sessions Court binding over the respondent for a period of 2 years in one surety in the sum of $2000. The respondent had pleaded guilty of 2 charges of unlawful possession of a Stirling .25 automatic pistol and 6 rounds of .32 ammunition respectively, being offences punishable under section 9(a) of the Arms Act, 1960. The Special President by way of sentence applied the provisions of section 294 of the Criminal Procedure Code, and instead of sentencing him at once to any punishment, ordered that the respondent be bound over.

**Held,** allowing the appeal: (1) in sentencing generally the public interest must necessarily be one of the prime considerations, and more particularly in offences involving the unlawful use or possession of firearms the public interest should never be relegated to the background and must of necessity assume the foremost importance;

(2) of the several concepts relevant to sentencing, deterrence and prevention assume positions in the forefront in relation to offences of this nature;

(3) if a person is not too young to have in his possession and to handle firearms and does so unlawfully then he is certainly not too young to suffer the penalties therefor prescribed by law;

(4) the order made by the Special President should be set aside, and the respondent sentenced to three years imprisonment on each charge, the sentences to run concurrently.

*Case referred to:—*

(1) *Reg.* v. *J.H. Sargeant* (1975) 60 Cr. App. R. 74, 77, 78.

CRIMINAL APPEAL.

*Wan Abdul Majid bin Wan Hamid* (Deputy Public Prosecutor) for the appellant.

*Paramjit Singh* for the respondent.

**Abdoolcader J.** (delivering oral judgment): The Public Prosecutor appeals against the order made in this case in the Special Sessions Court at Ipoh on July 7, 1975, in respect of the respondent who pleaded guilty to two charges of unlawful possession of a Stirling .25 automatic pistol and 6 rounds of .32 ammunition respectively being offences punishable under section 9(a) of the Arms Act, 1960 when the Special President by way of sentence applied the provisions of section 294 of the Criminal Procedure Code and, instead of sentencing him at once to any punishment, ordered that he be bound over in respect of each of the two charges for a period of two years in one surety in the sum of $2,000. The respondent's mother was directed to stand surety although the probation officer in his report, for some strange reason best known to himself, specifically advanced the suggestion that the respondent's mother should not be a surety and that the respondent should be released on his own recognizance and cautioned.

The charge against the respondent in respect of his unlawful possession of the automatic pistol was initially framed under section 8 of the Firearms (Increased Penalties) Act, 1971 which of course carries a much more severe penalty. He claimed trial to that and the other charge in respect of the ammunition

under section 9(a) of the Arms Act, but on June 2, 1975, the prosecuting officer tendered an amended charge under section 9(a) of the Arms Act in respect of the automatic pistol whereupon the accused pleaded guilty to both charges and the case was then adjourned to another date for sentence.

The facts adduced by the prosecution and admitted by the respondent are briefly that at about 9.30 p.m. on December 2, 1974, two police officers saw two persons standing on the five-foot way of the MCIS Building at Jalan Pasir Puteh, Ipoh, and when they approached these two persons started running but one of the officers after a short chase caught the respondent and found on his person a .25 automatic pistol in a holster. The pistol had a magazine containing 6 rounds of ammunition. The respondent was arrested but the other person managed to escape. The respondent had no arms licence or permit to possess the pistol and ammunition which were subsequently sent to the armourer who found the pistol serviceable and the bullets live and capable of firing.

The respondent stated in mitigation through counsel representing him before sentence was passed that he appreciated the seriousness of the charges but that he was misled by his friend who took advantage of his ignorance and simplicity and handed the pistol and ammunition to him and then ran away from the scene. I would have thought that his self-confessed simplicity lies more in the hollow and tenuous nature of the excuse he advanced which seems to me to be indeed unsurpassed in incredibility except perhaps by that of the pickpocket caught in *flagrante delicto* who sought to explain that he was looking for a box of matches, but when pressed as to why he could not ask for matches said that his mother had taught him never to speak to strangers. If indeed what the respondent said was true then obviously he should not and would not have admitted the facts adduced as he would not be in a position to know that the pistol which was found on him in a holster was in fact serviceable, knowledge of which would be in issue in view of the definition of 'arms' in section 2 of the Arms Act, and I would have expected him to have claimed trial to the two charges.

In sentencing generally the public interest must necessarily be one of the prime considerations, and more particularly in offences involving the unlawful use or possession of firearms the public interest should never be relegated to the background and must of necessity assume the foremost importance. Of the several concepts relevant to sentencing, it is my considered view that deterrence and prevention assume positions in the forefront in relation to offences of this nature. Lawton L.J. in his delightful analysis of the classic principles of sentencing and general aspects of punishment in the English Court of Appeal in *Reg.* v. *J.H. Sargeant*[1] observed (at page 77):

"Deterrent sentences may very well be of considerable value where crime is premeditated. Burglars, robbers and users of firearms and weapons may very well be put off by deterrent sentences."

I would think that in the present state of things the sobering effect of a deterrent sentence can be usefully extended to unlawful and unauthorised possessors of firearms and ammunition as well in view of the potential hazard they pose.

Deterrence in this case would be that of the respondent and likely offenders similarly inclined, but there is an ancillary but no less important aspect to deterrence in cases involving unlawful possession of firearms in preventing the possible progression from mere possession to sinister user. Serviceable firearms and ammunition are neither designed nor intended for decorative or ornamental purposes to be placed on the mantelpiece for display and admiration, and it is certainly not inconceivable that the hand that wields firearms may well be capable of injuring, maiming, and striking terror in the hearts of the innocent and perhaps at some stage even in fortuitous circumstances if not by design turning into and ending up as the hand of the assailant or even the assassin. So deterrence relates not only to the offence of unlawful possession but also serves the double purpose in such cases of at least reducing the possibilities of the possessor transforming into an active user of such offensive weapons.

The respondent was some 18 years and 5 months of age at the time he committed the offences in question, and it is in effect urged upon me that his age should be an overwhelming consideration for the purposes of any sentence imposed and for not sending him to prison. I regret I am not convinced that this is necessarily so as a matter of course in relation to a case involving the unlawful possession of firearms. If a person is not too young to have in his possession and to handle firearms and does so unlawfully then he is certainly not too young to suffer the penalties therefor prescribed by law. Just as he who plays with fire is liable to get burnt, so must he who plays with firearms without lawful authority or excuse do so at his peril and be prepared to accept the drastic consequences of such an act. If age alone were the sole determining factor in the severity of punishment in offences involving firearms and for not imposing a corrective custodial sentence, then it may not be impossible to envisage the horrifying spectacle of the community having on its hands and in its midst an unrestrained brood of gun-toting pistol-packing prone thugs of tender years on the prowl with dubious intent and running around loose on the strength of bonds of questionable efficacy equipped with the potential and perhaps even the inclination to put such offending objects to actual use with resultant terror, bodily harm and loss of life.

The respondent also puts forward in his plea in mitigation the fact that he is employed and supports an aged mother and step-brothers. He should of course have thought of this before committing the offences and not after; he is in fact pleading hardship arising from the consequences of his own acts and I would reiterate what I had occasion previously to observe in another case that an offender should not expect to excite or harness any sympathy on an *ipse dixit* by taking the stance of the impetuous youth who killed his parents with an axe and then pleaded in mitigation that he was an orphan. In any event from the probation report it would appear that his family is certainly not without other means of sup-

port. The respondent further undertakes to turn over a new leaf, as he puts it. That is as it should be and he should certainly do so but only after the proper and necessary correction has been administered to him in accordance with established principles of law for the offences under consideration in this matter.

It is my view that particularly in these times when the unlawful possession and use of firearms is rampant and ever increasing, a custodial sentence at the very least, of a term commensurate with the circumstances of the case, is called for. The respondent should consider himself extremely fortunate not to have been charged under statutory provisions carrying more serious and enhanced penalties for offences of this nature, and a bond under section 294 of the Criminal Procedure Code would seem to me to be wholly inadequate for offences of this gravity.

The courts may not perhaps have to wholly reflect public opinion but they certainly must not be indifferent or disregard it, and it must be made abundantly clear that in the light of the appalling increase in crimes involving violence and the unlawful possession and use of lethal weapons, society is crying out 'enough is enough' and is no longer in any mood to tolerate such offenders who like serpents in the front lawn of justice disrupt law and order. So be it clearly made known that the forces of justice will be vigorously brought to bear upon these engineers of evil who must be made to realise that if they indulge in violence or arm themselves with weapons of violence they will lose their liberty if nothing else and should not hope or expect to be released on bonds which in the current upsurgence of criminal violence would perhaps be about as useful and effective as clouting a cobra with a clothes-peg and may at best only have the functional effect for the period of suretyship of causing them, in the language of the automobile, to slip their gear into neutral but keep the motor running.

I would allow the appeal and set aside the order made by the Special President under section 294 of the Criminal Procedure Code, and taking into consideration all the circumstances and in particular his age and the fact that this is his first offence, I sentence the respondent to prison for 3 years on each charge, the sentences to run concurrently; and I trust that, if it is indeed true as he alleges that he was misled by his friend, whatever that means, the clanging of prison gates, as Lawton L.J. put it in *Reg.* v. *Sargeant*[1] (at page 78) or, perhaps more appropriately transmuted in a local context, the creaking of the prison doors closing shut behind him will afford the respondent ample opportunity to ponder on his folly in the company he keeps, and give to others of his ilk and equally gullible, cause to reflect on the desirability of the company they should or rather should not keep, for, as the ancient adage goes, he who sups with the devil must use a long spoon.

*Appeal allowed.*

Solicitors: *Paramjit Singh & Co.*

## PERNAS SECURITIES SDN. BHD. v. THE COLLECTOR OF STAMP DUTIES

**[O.C.J. (Chang Min Tat J.) March 26, 1976]**
**[Kuala Lumpur — Originating Motion No. 59 of 1974]**

*Stamp Duty — Whether chargeable on loan agreement — Contention of appellant that agreement is not security — Agreement providing for separate promissory note for each instalment — Whether loan agreement is security or mere agreement — Stamp Ordinance, 1949 — Stamp Duty (Special Provisions) Malaysia Act 1967, First Schedule, Items 22(1)(a) & 27(a).*

By a loan agreement executed on July 15, 1974, the lender agreed to lend to the appellant a sum of $10,000,000 upon certain terms and conditions. Clause 1 of the agreement specified the interest to be 9% on the principal loan. The whole sum was not to be immediately available but instead, it was to be given in 9 instalments spread over a year. The mode of payment and penalty for late payment were also provided. Upon each advance, the lender was to execute a promissory note.

The issue before the court was whether the proper stamp duty chargeable on the said loan agreement was as a security or as a mere agreement.

The appellant contended that the agreement was not "a security", that the security for the loan consisted of the several promissory notes and therefore the agreement was a mere agreement for the loan.

**Held:** (1) in construing provisions imposing the duty, strict attention must be paid to the actual words used by the legislature, but the words themselves must be understood in a 'popular sense', that is the sense which persons conversant with the subject matter with which the statute is dealing would attribute to them;

(2) the duty is imposed on the document and not on the transaction;

(3) the promissory note is a mere undertaking to repay the instalment and the agreed interest. It provides no security that is not given in the agreement and in fact the full protection of the lender is provided for in the agreement;

(4) the agreement is the principal or primary security and therefore chargeable under Item 22(1)(a) of the First Schedule to the Stamp Duty (Special Provisions) Malaysia Act 1967, at the rate set out in Item 27.

*Cases referred to:-*

(1) *Jones* v. *Commissioners of Inland Revenue* [1895] 1 Q.B. 484.

(2) *Independent Television Authority & Anor.* v. *Inland Revenue Commissioners* [1960] 2 All E.R. 481.

ORIGINATING MOTION.

*Abdul Kadir Kassim* for the appellant.

*Zulkifli bin Mahmood* (Senior Federal Counsel) for the respondent.

**Chang Min Tat J.:** This is a case stated under the provisions of section 39 of the Stamp Ordinance No. 59 of 1949 for the decision of the High Court whether the proper stamp duty chargeable on a Loan Agreement dated July 15, 1974 (the agreement) between Pernas Securities Berhad (the appellant) and American International Assurance Co. Ltd. (the lender) is as a security or as a mere agreement. As a security for a loan of $10 million it would attract stamp duty to the tune of $49,997 under Item 22(1)(a) read in conjunction with Item 27(a) of the First Schedule of the Stamp Duty (Special Provisions) Malaysia Act, 1967, and as a mere agreement which is not a security, the stamp duty would be $1 under Item 4 of the First Schedule.